

Attorney Docket No.: F3340(C)  
Serial No.: 10/579,352  
Filed: April 9, 2007  
Confirmation No.: 2140

### **REMARKS**

The present amendment is submitted in an earnest effort to advance the case to issue without delay.

Claims 1-24 were rejected under 35 U.S.C. § 112, second paragraph. The Examiner objected to a number of terms in the claims. Applicant traverses this rejection.

Specifically, claims 1-3 and 15-19 were said to be indefinite through recitation of "weight by weight". Applicant has amended the surviving claims to indicate that "weight by weight" refers to total weight of the confection rather than of the freezing point depressants.

Claims 1, 4 and 5 were said to lack clarity concerning the term "extensibility". Applicant points out that "extensibility" has been well defined in the specification. Note page 3 (lines 9-33) bridging to page 5 (line 32). There is nothing unclear about extensibility. Nonetheless, the term "extensibility" is now absent from the present set of amended claims.

Claims 6 and 20 stating "weight by weight monosaccharide, disaccharide, oligosaccharide and corn syrup" were said to be unclear with respect to the reference point. The amended claims all identify the term "weight by weight" as referring to the confection.

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Claims 7 and 21 were said to be unclear as to which carbohydrate is being selected from the group. With reference to corn syrup, the Examiner questioned "How is it in a group selected from corn syrup or other sugars given that 'corn syrup' is produced from corn?" Claim 7 has been canceled and claim 21 reworded to overcome this rejection.

Claims 8, 10 and 15 contain the term "an effective amount" which was said to render the claims indefinite. Applicant has canceled claims 8 and 10. Claim 15 has been amended to replace "an effective amount" with a range of 1-5% weight by weight of the confection of at least one protein. Support is found in the specification at page 10, line 17.

Claims 1-7 and 10-14 were rejected under 35 U.S.C. § 102(b) as anticipated by Malone et al. (U.S. Patent Application Publication No. 2003/0134024 A1). Applicant traverses this rejection.

Applicant reiterates claim of priority to a European patent application filed November 14, 2003. Malone et al. has an effective prior art date of December 19, 2002. Thus, applicant's priority date is less than one year prior to the reference. As noted by the Examiner in the Office Action at page 3 under paragraph 3, 35 U.S.C. § 102(b) bars patentability for an invention described in a printed publication *more than one year* prior to the date of application for patent in the United States. Since Malone et al. has an effective date less than one year prior, this document could not anticipate the claims.

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Claims 8-11 and 15-24 were rejected under 35 U.S.C. § 103(a) as unpatentable over Malone et al. (U.S. Patent Application Publication 2003/0134024 A1) in view of Daniel et al. (GB 2 357 954 A). Applicant traverses this rejection.

Malone et al. is not a reference against the claims. The invention of Malone et al. has some common inventorship with the present application and was published less than one year before the priority date of the present application.

A number of comparative experiments appear in the present specification performed against the Daniel et al. reference. Comparative Example 1 is a non-extensible ice cream. Comparative Example 2 is a standard extensible ice cream, which has a formulation very similar to that of Example 2 of Daniel. In Daniel et al. achievement of overrun is difficult. Producing extensibility at higher overruns is one of the problems solved by the present invention. Table 4 of the present text shows one advantage of the invention over comparative Example 2 (in Daniel et al.), namely increased extensibility at high overruns. Table 5 shows a further advantage, namely increased softness at minus 18°C.

Applicant has amended the claims to comport with those granted in the equivalent European application. In the European case as well as here, original claims 15, 16 and 23 were combined into an independent claim. Grants of similar scope are found in the equivalent Australia, China and India applications.

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In view of the foregoing amendment and comments, applicant requests the Examiner to reconsider the rejection and now allow the claims.

Respectfully submitted,

/ Milton L. Honig /

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Milton L. Honig  
Registration No. 28,617  
Attorney for Applicant(s)

MLH/sm  
(201) 894-2403